(2015) 03 KAR CK 0172

In the Karnataka High Court

Case No : Writ Petition No. 2578/2015 (T-RES)

Eblitz Inc. APPELLANT

Vs

Additional Commissioner of Service Tax and Others RESPONDENT

Date of Decision : 05-03-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Finance Act, 1994 — Section 85, 86
Limitation Act, 1963 — Section 5

Citation : (2015) 325 ELT 526 : (2015) 40 STR 884

Hon'ble Judges : Aravind Kumar, J.

Bench : Single Bench

Advocate : Sanmathi E.I., for the Appellant; Jeevan J. Neeralgi, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Aravind Kumar, J.—Heard Sri. E.I. Sanmathi, learned counsel appearing for petitioner and Sri. Jeevan S. Neeralgi, learned panel counsel appearing for respondents.

2. The short point involved in the present writ petition is whether the first appellate authority i.e., second respondent herein was justified in dismissing the appeal filed by petitioner who is a service provider on the ground that there is delay of 78 days in filing the appeal.

3. It is the contention of Sri. E.I. Sanmathi, learned counsel appearing for petitioner that first appellate authority ought not to have dismissed the appeal on the ground of delay particularly when it was contended that order under challenge was served on the petitioner on 11.09.2012 and as such the appeal filed on 13.09.2012 being well within the time, same ought to have been entertained on merits. It is contended that 1st respondent had passed the order on 31.01.2012 as per Annexure-C whereunder the demand for Service tax and Cess payable thereunder has been affirmed by confirming the show cause notice

and amounts already paid came to be appropriated by further imposing interest and penalty.

4. As per sub-section(3) of Section 85 of Finance Act, 1994 (as it existed then) appeal had to be filed within 90 days from the date of order. In the instant case it is not in dispute that appeal came to be presented on 13.09.2012 and as such petitioner himself has filed an application seeking for condonation of delay of 78 days in filing the appeal. Though Sri. E.I. Sanmathi, learned counsel appearing for petitioner contended before the first appellate authority and also before this court that order in original dated 31.01.2012 Annexure-C came to be served on the petitioner on 11.09.2012, no material whatsoever came to be produced in support of said contention. Except self serving statement of petitioner there is no material whatsoever available to arrive at a conclusion that order in original dated 31.01.2012 Annexure-C came to be served on petitioner on 11.09.2012 so as to exclude the period from date of order till date of service. In the absence of any proof being tendered petitioner cannot be heard to contend that this court in exercise of power under Article 226 of Constitution of India can condone such delay. When the statue prescribes the period of 90 days as the limitation to file an appeal and there being no provision under the Finance Act, 1994 to condone the delay by first appellate authority, question of entertaining such application for condonation of delay will not be in the domain of appellate authority. This view is fortified by the law laid down by Hon''ble Apex Court in the matter of Jain Spinners Ltd. Vs. Collector of Central Excise, . Similar question had also come up before Division Bench of this court in the case of Director of Mines and Geology Vs. C.C.E. (Appeals-II), and Division Bench of this court has held since the express provision has stipulated for filing of appeals by fixing the limitation, it would override the provision of Limitation Act, 1963 which is the general law and hence even if there is sufficient cause for condonation of delay beyond six months (in the said case) such delay cannot be condoned. It has been held by Division Bench as follows:

"6. A perusal of the aforesaid provision makes it clear that a right of appeal is created in favour of an assessee to challenge an order passed by the Adjudicating Authority subordinate to the Commissioner of Central Excise. The appeal lies to the Commissioner of Central Excise (Appeals). The appeal shall be preferred in the prescribed form and verified in the prescribed manner. Sub-Section 3 of Section 85 provides the period of limitation within which such an appeal is to be filed. It provides three months time to prefer an appeal from the date of receipt of the decision or order of such Adjudicating Authority. A proviso to the said provision makes it clear that if the appeal is not filed within three months as prescribed under sub-Section 3 of Section 85, the Commissioner of Central Excise (Appeals) is vested with the power to condone the delay if sufficient cause is made out for the delay in preferring the appeal. However, the said delay cannot exceed three months in addition to the period of three months prescribed for preferring an appeal. Therefore, the Act provides for a period of limitation as well as the provision for condoning the delay. Therefore, when an express provision is made for a period of limitation and also for condoning the delay, the said provision override the provisions of the Limitation Act which is the general law governing the law of limitation. In those circumstances, Section 5 of the Limitation Act, which provides for condoning the delay, is not attracted.

7. In the case of an appeal against the said appellate order to the Tribunal, three months time is prescribed for preferring such appeal, whereas in Section 86 no provision is made for condoning the delay. In the absence of any express provision for condoning the delay in Section 86, Section 5 of the Limitation Act is attracted. Therefore, under the scheme of the Act when specific period of limitation is provided under the Act and also for condoning the delay, the discretion, which is vested in the Appellate Commissioner, has to be exercised within the four corners of the law. In other words, if there is a delay in preferring the first appeal under Section 85 and if the delay is upto the extent of three months, then the Appellate Commissioner is vested with the power to condone the delay if the cause shown is sufficient cause. In other words, even if the cause shown constitutes sufficient cause and if the delay is more than three months he has no jurisdiction to condone the delay. Therefore both the judgments relied on by the learned Counsel for the assessee has no application to the facts of this case.

8. In the judgment of the Apex Court they were interpreting Section 5 which has no application to the facts of this case. In the judgment relied on of this Court in the case of Praxair India Pvt. Ltd. Vs. Commissioner of C. EX. and S.T., , the question for consideration was whether the Tribunal was justified in dismissing the appeal on the ground of delay of 229 days on the ground that the cause shown is not the sufficient cause. That is not the position in this case. In this case the question is whether the Appellate Commissioner was justified in dismissing the appeal on the ground of limitation as the delay was more than three months after the expiry of three months prescribed for filing an appeal after receipt of copy of the order. Therefore, the order passed by both the authorities is legal and valid and does not call for any interference. The substantial question of law is answered in favour of the revenue and against the assessee. Accordingly, the appeal is dismissed".

In that view of the matter, I do not find any merit in this petition accordingly it stands dismissed.

No opinion is expressed on merits of the claim.

Sri. Jeevan S. Neeralgi, learned panel counsel appearing for respondents is permitted to file memo of appearance within four weeks from today.

